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1 A P P E A R A N C E S:

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4 Attorney, 1 Courthouse Way, Room 9200, Boston, Massachusetts,
5 02210, for the Plaintiff.

6 MAKSIM NEMTSEV, ESQ., 20 Park Plaza, Suite 1000,
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10 for the Defendant.

P R O C E E D I N G S

THE COURT: Okay, I hope you all had a nice lunch.
Please be seated.

Okay, so we begin with the jury verdict form. Does anyone have a problem with it? I will change Count One. I think the government was right when they said it should be "to access computers or to commit wire fraud or to commit securities fraud." But other than that, does anyone have a problem with the verdict form?

02:48 10 MR. FERNICH: No.

THE COURT: Oh, I had actually a question for the defendant on this because the way it's charged in the indictment, and this is something I didn't know if you wanted to sanitize the indictment --

15 NEMTSEV: Yes.

16 THE COURT: Is there a/k/a's?

17 MR. FRANK: It's just an alternate spelling of his
18 name.

19 THE COURT: In fact there's something -- that's even
02:48 20 wrong, but I thought we would just get rid of the a/k/a's. And
21 that should probably come out of the indictment too, but I did
22 think it should include the three of them, right?

23 MR. NEMTSEV: And, Judge, would it make sense to,
24 rather than CC-1, put in Mr. Sladkov and Mr. Irzak just for
25 clarity?

1 THE COURT: That's not on the verdict form.

2 MR. NEMTSEV: Oh, sorry, sorry. I thought we were
3 talking about the indictment.

4 THE COURT: Well, I'll get to that in a minute. I'm a
5 step-by-step kind of person, so --

6 So other than that, is there anything I missed? I've
7 got the conspiracy in Count One, wire fraud, aiding and
8 abetting, unauthorized access to computers, aiding and
9 abetting, securities fraud, aiding and abetting, and
02:49 10 specifically not a question about venue. That's what you all
11 want?

12 MR. FERNICH: No objection.

13 MR. KOSTO: Correct, your Honor. When appropriate,
14 there is a venue-related issue we'd like to raise, though.

15 THE COURT: Don't forget, I'm step by step.

16 MR. KOSTO: Exactly.

17 THE COURT: The verdict form is fine?

18 MR. FERNICH: Yes.

19 THE COURT: Good. Now, with respect to the
02:50 20 indictment, have you had a chance to work together -- maybe you
21 haven't -- just to clean up the indictment? We do need to send
22 it in, but there may be certain aspects like the a/k/a's that
23 you might want to discuss, so I urge you to do that. I don't
24 think we need to address that here because I don't think you're
25 ready, right? But we will have to send in the indictment.

1 MR. KOSTO: We'll connect and discuss.

2 THE COURT: All right, now, with respect to the jury
3 charge, why don't I start with the government's objections. As
4 you both agree, there was a typo, so I will fill it in with the
5 way the government -- I'm just going from Page 1 -- I will fix
6 Page 3 of Instruction 16, which was a typographical error.
7 Okay, all right. And then there was -- and I think the
8 government is correct, that's what I meant to say.

9 MR. KOSTO: Your Honor, on Page 2 of Instruction 15,
02:51 10 at Line 442 --

11 THE COURT: Wait, wait. Say it again. I'm sorry.

12 MR. KOSTO: I think maybe this is the one you've
13 addressed, but this is the "or, or, or" in the instructions as
14 distinguished from the verdict sheet.

15 THE COURT: Yes, yes, I'm sorry, I -- yes, that's
16 right. I agree with that.

17 MR. KOSTO: Okay.

18 THE COURT: I will use the disjunctive.

19 Okay, Instruction 17, you object to multiple
02:52 20 conspiracies. Did you want to say anything more than what was
21 in this brief? I do agree I'm going to strike what Klyushin
22 intends, but I am going to give something on multiple
23 conspiracies.

24 MR. FRANK: We understand that, your Honor. We
25 thought it could be shorter. My concern about the last

1 sentence is that it is a little confusing. It sort of
2 resembles the test that courts apply when evaluating whether
3 there are multiple conspiracies, but it's incomplete, and we
4 don't think that's the test, in any event, that juries apply.
5 And so we think that the simpler instruction that the First
6 Circuit has approved is more clear, but that, in any event, the
7 two instructions, this instruction would be closer to the First
8 Circuit instruction without that last sentence.

9 THE COURT: I think arguably -- I don't know if you
02:53 10 want to respond to those.

11 MR. FERNICH: Yes. You know, we took it straight from
12 Sands, and this is also in the nature of a "theory of defense"
13 charge, and we're entitled to a charge on any theory of defense
14 that has foundation in the record. So I would object to
15 truncating this. It's important to us, and this one and
16 partial venue --

17 THE COURT: As a matter of law -- I was thinking this
18 through -- the conspiracy charged involves five people,
19 Ermakov, Rumiantcev, the defendant, Irzkov, and Sladkov, "and
02:53 20 others."

21 MR. FRANK: We disagree with that, your Honor.

22 THE COURT: Those are the only people mentioned, "and
23 others."

24 MR. FRANK: But in the count, there's only three
25 people specifically mentioned, and the others are specifically

1 not mentioned. We believe that they are coconspirators.

2 THE COURT: Well, you've alleged two unindicted
3 coconspirators.

4 MR. FRANK: But not in the count, and so we don't
5 believe that it is our burden to prove that the conspiracy
6 encompasses them. We believe they're relevant and they come in
7 under --

8 THE COURT: Does the count refer to "others"?

9 MR. FRANK: "Known and unknown."

02:54 10 THE COURT: Yes, it always does.

11 MR. FRANK: Correct.

12 MR. FERNICH: And it incorporates everything else by
13 reference.

14 THE COURT: In any event, I'm likely to keep this
15 charge in there. I think you could find that there were two
16 running parallel conspiracies with the same goal to hack. On
17 the other hand, it more than adequately supports the
18 government's case that it's one conspiracy, since they all
19 traded in parallel, and I'll just do this. Speaking of which,
02:54 20 I do -- see, this is why I had asked for, and didn't get, a
21 proffer on the conspiracy. And then I do find under the law --
22 the First Circuit calls it *Petrozziello* -- that there is
23 probable cause to believe that the conspiracy includes at least
24 five people. It's up to the jury to decide whether there are
25 two conspiracies.

1 All right, so the next one is good faith. I always
2 give a good-faith instruction.

3 MR. KOSTO: And if the Court were to do that, we'd
4 simply ask that it give the good-faith instruction in one place
5 and not with respect to each count.

6 MR. FRANK: Our objection is to repeating it three
7 separate times.

8 THE COURT: I don't know. I don't know if I'm being
9 redundant or not. I just copied basically their good faith
02:55 10 instruction.

11 MR. FRANK: Right, but our objection is to the fact
12 that it's given three separate times.

13 THE COURT: I don't know. I'll think about that.
14 It's not a big point. Good faith is clearly part of any case.

15 All right, now, definition of protected computer, did
16 you have a problem with the government's suggestion that
17 anything over the Internet is interstate commerce?

18 MR. FERNICH: No.

19 THE COURT: What?

02:56 20 MR. FERNICH: No.

21 THE COURT: Okay, that comes in, and that's Jury
22 Instruction 21. That makes sense. I think it makes it simpler
23 for the jury, and it's correct, more importantly.

24 You both agreed on this, and this is the part I was
25 worried about with materiality -- excuse me -- with things

1 being too wordy, is that the standard securities fraud,
2 materiality does not apply to a hack and trade kind of case,
3 and I agree with both of you that the "reasonable investor"
4 language needs to come out of it.

5 MR. KOSTO: There is a single sentence, your Honor, on
6 Page 3 of Instruction 25 which concerns the second element.
7 That sentence at the top, this is -- I've lost the line
8 numbers --

9 THE COURT: Yes, we did, yes.

02:57 10 MR. KOSTO: "A misstated or omitted fact is material
11 if there is a substantial likelihood that the disclosure of the
12 omitted fact would have been viewed by a reasonable person as
13 having significantly altered the total mix of information made
14 available." We think that the best way to phrase materiality
15 outside of the trading context is --

16 THE COURT: What page are we on?

17 MR. KOSTO: We were at the bottom of Page 2 of
18 Instruction 25, the sentence --

19 THE COURT: Of material fact, yes, I just crossed that
02:57 20 out and I added something else.

21 MR. KOSTO: A material fact here would be information
22 that would affect the decision-maker, whoever that might be; in
23 this case, the administrator of a computer.

24 THE COURT: I'm not even sure that works. What I was
25 going to say is, "The government must prove a misrepresentation

1 of the identity of the defendant, or another coconspirator's
2 identity online, to access a computer system to obtain material
3 nonpublic information." Wouldn't that just be enough if you
4 proved misrepresentation of identity?

5 MR. KOSTO: Or another participant in the scheme.

6 THE COURT: Or another person in the conspiracy.

7 MR. KOSTO: "A participant in the scheme" because it
8 need not be a coconspirator. This is the substantive count.

9 THE COURT: "Or another," okay, "participant in the
02:58 10 scheme"?

11 Now, what about, "Misrepresentation of a fact is
12 material if it has a natural tendency to influence or is
13 capable of influencing --" I'm just not sure we need that.
14 This is about whether or not there was a phony identity.

15 MR. FRANK: We have no objection to taking it out.

16 MR. FERNICH: I would take it out.

17 THE COURT: This is what this case is.

18 MR. FERNICH: I would take it out altogether.

19 THE COURT: Yes, so I'm just going to say that "The
02:58 20 government has to prove there was a use of a false identity as
21 part of the scheme."

22 MR. FRANK: Yes, your Honor.

23 THE COURT: Okay. And, by the way, I'm hoping to get
24 you another draft of this so that you'll see the whole thing
25 play out. I cross out completely the next paragraph. You both

1 suggest that, and that's correct.

2 MR. FERNICH: So I just want to make sure that we're
3 all on the same page. At the bottom of page -- your Honor is
4 going to keep at the bottom of Page 1 of the instruction
5 through the top of Page 2, "If you find the scheme involved the
6 defendant or another participant." You're going to add that as
7 Mr. Kosto suggested, and that's going to stay. And then we go
8 to the bottom of Page 2. You're just going to take out the
9 bottom Paragraph, yes, altogether?

02:59 10 MR. KOSTO: The bottom sentence.

11 MR. FERNICH: Well --

12 THE COURT: Wait, wait, wait, wait. What sentence are
13 you referring to? I'm knocking out the entire first paragraph.

14 MR. FERNICH: Okay, so now --

15 THE COURT: "A misstated or omitted fact is
16 material --"

17 MR. FRANK: But there's still the requirement that it
18 be material nonpublic information, so I actually do think there
19 needs to be a materiality component.

03:00 20 THE COURT: That's why we're going through this.

21 MR. FERNICH: Okay, I'm not making myself clear. So
22 let's start with 25 and go to the bottom of Page 1, straddling
23 Page 2.

24 THE COURT: All right.

25 MR. FERNICH: It's going to say, "If you find that the

1 scheme involved the defendant or another participant
2 misrepresenting their identity online to access computer
3 systems to obtain material nonpublic information to trade on
4 the confidential information, then you may find --" That's all
5 going to stay in, right?

6 THE COURT: Yes.

7 MR. FERNICH: Now I'm moving down to the last full
8 paragraph at the bottom of the page, Page 2.

9 THE COURT: Yes.

03:00 10 MR. FERNICH: All of that is coming out or staying in?

11 THE COURT: No. This is the way I'm thinking of
12 having it read -- and I'll get you a redraft so it won't be a
13 surprise for anyone -- "If you find that the government has
14 established beyond a reasonable doubt that a statement was
15 false or a fact fraudulently omitted, you must next determine
16 whether the fact misstated was material under the circumstances."
17 Then I was going to say "The government --"

18 MR. FRANK: I think -- I'm sorry, your Honor. I
19 didn't mean to interrupt. I think that that -- that's where I
03:01 20 think we agree that with respect to the misrepresentation of
21 identity, that doesn't need to be in there. The only reason
22 there needs to be a materiality instruction is because the
23 information taken --

24 THE COURT: Can I tell you, I was just going to follow
25 with a sentence, "In this case, therefore, the government must

1 prove a misrepresentation of the identity of the defendant or
2 of another participant in the scheme online to access the
3 computer system to obtain material nonpublic information."

4 MR. FRANK: I think you just said that in the prior
5 sentence.

6 MR. FERNICH: That's right. So my point is, I think
7 that there's common ground between the government and myself.

8 THE COURT: You don't think I need that sentence?

9 MR. FERNICH: No, because it's covered by the
03:02 10 paragraph that starts at Page 1 and 2.

11 THE COURT: Okay, okay.

12 MR. FERNICH: Mr. Frank, do you want some definition
13 of "materiality," or are you --

14 MR. FRANK: For purposes of determining what material
15 nonpublic information is.

16 MR. FERNICH: Right, I understand. So what would you
17 propose for that?

18 MR. FRANK: So I actually -- so there, there is a
19 definition of "materiality" on the next page.

03:02 20 MR. FERNICH: I understand.

21 MR. FRANK: And so I think instead of saying "A
22 misstated or omitted fact is material," I think we could just
23 say "A fact is material" or "Information is material --"

24 MR. FERNICH: Yeah, I like that better, okay? You're
25 basically trying to define what material nonpublic information

1 is.

2 MR. FRANK: Correct.

3 THE COURT: Yes, but here it doesn't make sense. This
4 is the part I had the problem with that I was flagging
5 yesterday because if a reasonable person involving the total
6 mix of information --

7 MR. FERNICH: How about "Nonpublic information is
8 material if there is --"?

9 MR. FRANK: Well, actually, we can use the definition
03:03 10 on the prior page: "Information is material if it would have
11 been significant to a reasonable person's investment decision."

12 MR. FERNICH: Yeah, I think that starts to confuse the
13 theory.

14 THE COURT: Yes, because it's not an investment
15 decision. Whoever it was -- I mean, the one thing there could
16 be no doubt about is, there was a hack here. Maybe you don't
17 agree with that, but the question is who did it, who done it?
18 And --

19 MR. FRANK: Your Honor, I'm just suggesting a
03:03 20 definition of materiality for material nonpublic information,
21 and that does relate to investment decisions because that's
22 what makes it material nonpublic information.

23 MR. FERNICH: He wants to get at what was allegedly
24 taken being material nonpublic information. I just don't want
25 that to be confused with the representations that are at issue

1 in this case.

2 MR. FRANK: We could move it elsewhere. "For purposes
3 of determining what is material nonpublic information,
4 information is material if it would have been significant to a
5 reasonable person's investment decision."

6 MR. FERNICH: Yes, that's fine.

7 THE COURT: Where do you want to put that?

8 MR. FERNICH: You should probably put it right after
9 the straddle part, right?

03:04 10 MR. KOSTO: You can put it right after device, scheme
11 or artifice -- wait a minute. I take that back.

12 MR. FRANK: I think it can go anywhere if you're
13 introducing it with "for purposes of determining what is
14 material nonpublic information."

15 MR. FERNICH: I would make it the first full paragraph
16 on Page 2 of the instruction, move it right -- after your Honor
17 explains "Hacking in to take material nonpublic information is
18 deceptive," then your Honor could say whatever prefatory
19 information Mr. Frank wanted, and then put that first
03:05 20 sentence --

21 THE COURT: Could you write out what you just said,
22 Mr. Frank? I'm not sure I know what you want because I --

23 MR. FRANK: So at the bottom of Page 1, it says, "If
24 you find that the scheme involved the defendant or another
25 misrepresenting their identity -- or another participant

1 misrepresenting their identity online to access computer
2 systems to obtain material nonpublic information to trade on
3 the confidential information, then you may find --" So that
4 sentence would stay. Then the next sentence would be, "For
5 purposes of determining whether nonpublic information is
6 material --"

7 MR. FERNICH: "-- material fact --"

8 MR. FRANK: "-- a material --"

9 THE COURT: "For the purpose of determining --"

03:05 10 MR. FRANK: "-- whether information is material --"

11 MR. FERNICH: "-- whether nonpublic information is
12 material."

13 THE COURT: "-- whether nonpublic --"

14 MR. FERNICH: "A misstated or omitted fact is
15 material --"

16 MR. FRANK: No, no, it doesn't have to be misstated or
17 omitted. "A material fact is one that would have been
18 significant to a reasonable person's investment."

19 THE COURT: "Nonpublic information is material --"

03:06 20 MR. FERNICH: "-- if there is a substantial
21 likelihood --"

22 MR. FRANK: Or we could just say, "Information is
23 material if it would have been significant to a reasonable
24 person's investment decision."

25 MR. FERNICH: That's fine.

1 THE COURT: I'm just trying to capture the exact
2 language from the standard.

3 "-- if it would have been viewed by a reasonable
4 person as --"

5 MR. FRANK: "-- significant to their investment
6 decision."

7 MR. FERNICH: "-- or as having significantly --"
8 whatever your Honor has there on current Page 3.

9 MR. FRANK: That's fine. "-- or as having
03:07 10 significantly altered the total mix of information available."

11 THE COURT: Yes.

12 MR. FERNICH: Just merge Mr. Frank's preface with what
13 your Honor has written on Page 3.

14 THE COURT: Let me read it all. Why don't I play with
15 it, and I'll give you a revised version tomorrow, sort of get
16 the gist of it. But I think what we have to get rid of is,
17 it's not the reasonable investor in the -- well, there are two
18 things here: First there's, "Do you find there was a
19 misrepresentation of identity, Julie Soma?" and, "Do you find
03:08 20 that what was taken was material information?" Those are the
21 two concepts I'm going to get at by merging these sections.
22 I'm not sure exactly how I'm going to do it yet, and I'll give
23 you a revised version. Okay.

24 So we are now at venue. I don't know --

25 MR. KOSTO: So, your Honor, on venue --

1 THE COURT: What's your issue?

2 MR. KOSTO: -- there is a federal statute that solves
3 this problem easily.

4 THE COURT: 3647?

5 MR. KOSTO: 18 U.S.C. 3238.

6 THE COURT: 3238.

7 MR. KOSTO: It is called the "first-brought venue
8 provision," and what it says is that "If an offense starts
9 outside the United States, venue is proper in the first place
03:09 10 the defendant is brought into custody." The defendant here
11 was --

12 THE COURT: I hadn't heard about this one.

13 MR. KOSTO: You sent us upstairs to research over
14 lunch, and I apologize we didn't raise it earlier, but the
15 defendant flew nonstop from Switzerland to here in the company
16 of Agent Hitchcock, and this is the first place he was brought.
17 And Congress and the First Circuit -- this is the oldest case
18 I've ever cited dating all the way back World War II -- has
19 held this to be a valid doctrine for venue. It is a much
03:09 20 simpler way to address this problem.

21 THE COURT: 18 U.S.C., Section 3238?

22 MR. KOSTO: Yes, and it's been endorsed since --

23 THE COURT: All right, you're just popping it on me.

24 MR. KOSTO: I understand it's late, your Honor, but it
25 is the law.

1 MR. FERNICH: No, it can't be the law because that
2 would enable them to manufacture venue, any foreigner -- it
3 might have been the law in 1800 or 1700, but in the age of the
4 Internet, anybody from Mozambique who accesses the Internet in
5 Buque in order to commit a fraud in Florida, they could just
6 choose to fly them into Buque and try them there? No way.

7 MR. KOSTO: Well, first of all, Congress wrote the
8 law.

9 MR. FERNICH: It's not the law as set forth --

03:10 10 THE COURT: Excuse me. I can only hear one of you at
11 a time. Could you read the exact statute.

12 MR. KOSTO: Wait a minute.

13 THE COURT: I have it right here. What is it?

14 MR. KOSTO: It's 18 U.S.C., Section 3238.

15 MR. FRANK: We can hand it up, your Honor.

16 MR. KOSTO: If you'd like, we have a printout for
17 Mr. Fernich and for you.

18 THE COURT: Yes, please.

19 MR. KOSTO: I'll proceed when the Court is ready.

03:10 20 It's really the first two lines of the statute, not the last
21 three, and there's binding First Circuit precedent on the
22 point.

23 MR. FERNICH: If that's the law, the statute violates
24 the Sixth Amendment as applied to this defendant. There's no
25 doubt in my mind about it.

1 THE COURT: Hold on a second. I just need to read it.
2 I'm reading it and thinking out loud. So if the jury found
3 that the crime was committed in Russia --

4 MR. FRANK: Was begun in Russia.

5 THE COURT: What?

6 MR. FRANK: Done or committed.

7 THE COURT: -- begun in Russia --

8 MR. FRANK: We actually don't -- so our position,
9 Judge, is that this actually should remove this from being a
03:12 10 jury issue at all because there's no dispute --

11 MR. FERNICH: Go for it. Go for it. I'll take that
12 up on appeal.

13 THE COURT: I'm thinking about it. Calm down. This
14 is a surprise pop on --

15 MR. FERNICH: Well, that's the point, okay? Even if
16 it's not an element --

17 THE COURT: Excuse me. Would you let me finish?

18 MR. FERNICH: Yes.

19 THE COURT: There is a statute. So what might happen
03:12 20 is, "If you find that --" we don't even have this yet -- "If
21 you find that the crime occurred outside -- began outside, then
22 venue is proper in the United States." It's possible that they
23 found that the crime was begun --

24 MR. FRANK: Well, it doesn't matter whether it was
25 Russia. If it was begun anywhere outside the United States --

1 MR. FERNICH: That's not what the statute says at all.
2 It says, "Upon the high seas or elsewhere out of the
3 jurisdiction," not of the United States, "of any particular
4 state or district."

5 MR. FRANK: The case law is crystal clear that --

6 THE COURT: I tell you what: You're popping it on me.
7 You're popping it on the defense. It's really worthwhile to
8 consider. I sure wish I hadn't spent as much time thinking
9 about it as I've been thinking about it.

03:13 10 MR. KOSTO: You and me both, your Honor. Can I give
11 you one cite to take with you?

12 THE COURT: Two cites, and I'll think about it.

13 MR. FRANK: The only thing I would add is, if your
14 Honor intends, after reviewing the statute, to put the statute
15 to the jury, in that case we would ask to reopen to have
16 Agent Hitchcock testify to the single fact that, unless the
17 defense stipulates to it, that the defendant was brought upon
18 arrest to Boston.

19 MR. FERNICH: We're not stipulating to anything
03:14 20 because whether or not venue is an element of the offense or
21 not, it's an element of their burden of proof. And this is a
22 constructive amendment to the indictment. There's zero notice
23 of this. They've known about venue forever. There's zero
24 notice, and they're constructively amending the indictment.
25 And the Supreme Court is going to tell us exactly what venue it

1 is. Whether it's an element of the offense under *Blockburger*,
2 it's certainly an element of their burden of persuasion.
3 Totally different.

4 MR. KOSTO: The indictment alleges that the offense
5 took place in the District of Massachusetts and elsewhere, so
6 it is not being constructively amended. But the name of the
7 case is *United States v. Chandler*. The cite is 171 F. 2d
8 921 -- I'm embarrassed to say this -- in 1948. And the facts
9 of the case involved an individual arrested in Germany for
03:15 10 wartime activities, and the plane landed at Westover Air Force
11 Base to refuel on its way down to Washington, D.C. The
12 defendant was indicted in Massachusetts. He actually argued
13 that the language of the venue statute which applied back then
14 didn't apply to him because the crime wasn't committed on the
15 high seas; and the First Circuit held, no, the language refers
16 to an offense begun or committed outside the United States.

17 So it appears to the government that it is a binding
18 interpretation of the statute, and we're offering it as an
19 alternative basis for venue under the law of the circuit.

03:15 20 MR. FERNICH: Give me the cite, please.

21 MR. KOSTO: It's 171 F. 2d 921.

22 In that half hour we had over lunch, there are four or
23 five cases in this circuit or districts in this circuit that
24 talk about first-brought venue. It's not often used, but it is
25 a thing.

1 MR. FERNICH: I'm going to tell you right now that if
2 that's the way they're going to go, A, it's a constructive
3 amendment; B, in the circumstances of this case where somebody
4 from a foreign country is alleged to have used, not in any
5 essential offense conduct element, a VPN site in this district
6 as a passthrough with no purposeful or foreseeable conduct
7 actuating that VPN, that application of this venue statute here
8 violates Article III of the Constitution, and the Sixth
9 Amendment of the Constitution, and Federal Criminal Procedure
03:16 10 Rule 18 of the Constitution.

11 This is in no way anything that the framers of the
12 U.S. Constitution, who put the venue guarantee in there twice,
13 would have remotely foreseen. It's the exact evil that the
14 venue provision was designed to guard against.

15 MR. KOSTO: In the place where --

16 THE COURT: Excuse me. Enough. That's just rhetoric
17 at this point. Let's just look at the case law. I'm not
18 prepared to rule, and I'm not going to rule, right now. So as
19 far as I'm concerned --

03:17 20 MR. FERNICH: And we've already opened on particular
21 venue arguments, and to spring this at this minute, that's
22 nuts.

23 THE COURT: Did anyone mention venue in the opening
24 statements?

25 MR. FRANK: Mr. Nemtsev did.

1 MR. NEMTSEV: I did, your Honor. We argued venue, why
2 is this case in Boston?

3 MR. KOSTO: We would not have put in as much venue as
4 we did if this were in our heads, and it wasn't, your Honor.

5 THE COURT: I understand. All right, so let me think
6 this through.

7 MR. FRANK: The other point on venue, just leaving
8 aside this issue, is that under 3237, the offenses that we've
9 charged are all continuing offenses.

03:17 10 THE COURT: They are. That is clear. I don't know,
11 since you've rested --

12 MR. FRANK: Well, so I wanted to --

13 THE COURT: -- whether or not you've waived it. I
14 mean, there's that other issue: You haven't mentioned it. You
15 didn't put it in your opening.

16 MR. FRANK: We've not waived it, your Honor. So I did
17 cite some cases to the Court, and I cite them again, where the
18 First Circuit, and every other circuit to consider this issue,
19 has held that on the issue of venue, the government can be
03:18 20 permitted to reopen to address that fact.

21 THE COURT: I think that may be true, and it would
22 just be one line, which is, "He was arrested and brought into
23 Massachusetts."

24 MR. FRANK: It would literally be one question, yes.

25 THE COURT: But to suddenly have you waive the whole

1 argument, in other words, in terms of its --

2 MR. FRANK: I don't think there's a waiver. I don't
3 think that's a thing.

4 THE COURT: I don't know.

5 MR. KOSTO: One of the reasons this wasn't accelerated
6 was, it wasn't brought as a motion to dismiss for improper
7 venue under the Rules of Criminal Procedure, so it's coming
8 late in the day.

9 MR. FERNICH: That's because there was no venue defect
03:19 10 evident from the face of the indictment, and the motion would
11 have been denied out of hand because they had the opportunity
12 to prove venue.

13 MR. FRANK: And that's sort of our point, your Honor,
14 is that as a matter of law, venue is proper in this district.
15 There is literally no dispute among the parties that he was
16 brought first to this district.

17 THE COURT: It's just if you had brought it that way
18 initially -- I understand most cases are resolved as a matter
19 of law, but where there are disputed issues of fact, it goes to
03:19 20 a jury, and now you've created this procedural mess that I have
21 to figure out. I can't do it as a matter of law now that it's
22 been fully brought to the jury. I mean, that just seems unfair.
23 But I'm thinking out loud, and that's always a bad way to go,
24 so let me think about it.

25 MR. FRANK: Understood, your Honor.

1 THE COURT: And it's just a mess.

2 MR. FRANK: Well, I would say, we had no idea that
3 they would open on that issue. That was also a choice, and
4 this statute is in the books for both parties to look at.

5 THE COURT: Can I say this: It was never, never,
6 never in doubt that once we had the debate about the MaxMind
7 application, which was several weeks before trial, it was clear
8 that there was going to be a debate about venue. So this was
9 not something that they brought up at the last minute in
03:20 10 openings. It was fully freighted, and let me think about it.

11 I'm not going to do anything on preparation of
12 witnesses or individuals not on trial.

13 Okay, now, on venue, what do I do about foreseeability
14 because it is -- we've looked it up -- there's no First Circuit
15 pattern instruction on point. There's no First Circuit law
16 directly on point. And there's a straight-up split in the
17 circuits with the Second Circuit, which requires
18 foreseeability, being in the minority of the circuits.

19 I think foreseeability might be relevant. I'm not
03:20 20 saying -- I haven't ruled on whether I'd allow a question about
21 it, but I don't think it's a burden on the government's part
22 to find foreseeability under the weight of the case law right
23 now and the plain language of the statute, which does not
24 include foreseeability, so I'm unlikely to give a foreseeability
25 instruction.

1 However, it's preserved for you because, fair enough,
2 the Second Circuit -- the First Circuit loves the Second
3 Circuit -- may decide to go that way. So information may be
4 relevant that you may elicit tomorrow, but -- and you'll
5 preserve it.

6 MR. FERNICH: Fine. I understand. Thank you.

7 THE COURT: On the defendants --

8 MR. FERNICH: Judge, I have one that I just thought of
9 on 6, Instruction 6, credibility.

03:21 10 Forgive me. I switched out of my Sands book.

11 THE COURT: Instructions? Can we go through your
12 objections first?

13 MR. FERNICH: Yes. I have one that I wanted to add.
14 I switched out of my Sands to look at the case. On credibility
15 from Sands 71 --

16 THE COURT: Wait a minute. I've got to get back to
17 Instruction 6.

18 MR. FERNICH: Oh, I have it. Never mind. I would
19 just like to have the sentence added in the factors you may
03:22 20 consider in determining credibility, "How did the way the
21 witness testified on direct examination compare with how the
22 witness testified on cross-examination?"

23 THE COURT: So this is on line what?

24 MR. FERNICH: Any of the lines where you did the
25 examples: "You should consider the conduct and demeanor of the

1 witness while testifying," in any of those semi-colons.

2 THE COURT: Yes, and what do you want to say?

3 MR. FERNICH: "How the way the witness testified on
4 direct examination compared with the way the witness testified
5 on cross-examination."

6 THE COURT: All right, so let's go through the ones
7 that you listed. Wire fraud, which is --

8 MR. FERNICH: Yeah, wire fraud.

9 THE COURT: Do you disagree with their draft
03:23 10 Instruction 19?

11 MR. FERNICH: No. Just instead of disjunctive, just
12 conjunctive.

13 MR. FRANK: I'm sorry. Where are we?

14 THE COURT: Draft Instruction 19. Do you have an
15 objection to saying "to defraud and obtain money or property"?

16 (Pause.)

17 MR. FRANK: I don't think that we need to prove --
18 well --

19 THE COURT: The First Circuit pattern instructions say
03:24 20 "to defraud or to obtain money or property by means of false or
21 fraudulent pretenses."

22 MR. FERNICH: That's our preference, your Honor. It's
23 not vital one way or another.

24 THE COURT: To take the First Circuit pattern
25 instructions?

1 MR. FERNICH: Yes.

2 THE COURT: Does that seem okay to you? Okay, so...

3 Well, actually, that's the way I have it.

4 MR. FERNICH: Yes, you're okay.

5 THE COURT: I think I'm okay with that. I think I'm
6 okay with that. All right?

7 And then this is not a good quote from *Dorozkho*.

8 MR. FERNICH: I'm sorry?

9 THE COURT: On draft Instruction 25, securities fraud,
03:25 10 this is not a good quote. It's a partial quote, and I don't
11 think that's accurate from *Dorozkho*.

12 MR. FERNICH: Which part does your Honor think is not
13 accurate? I think the word is "may" --

14 THE COURT: Excuse me. It says --

15 MR. FERNICH: "May not be."

16 THE COURT: It says -- I'm reading -- you're welcome
17 to take a look at it -- "It is unclear, however, that
18 exploiting a weakness in an electronic code to gain unauthorized
19 access is deceptive rather than being mere theft."

03:26 20 So I'm not inclined to do that because I think that's
21 not what they were trying to say. But, in any event, the issue
22 here I've already addressed by saying they have to prove
23 misrepresentation, so I don't think we need to go there.

24 MR. FERNICH: Okay.

25 THE COURT: And I think the next points about those

1 two sections as being extraneous are correct. That's what we
2 just fixed, I think.

3 MR. FERNICH: Yes.

4 THE COURT: On venue, did you have a problem -- I
5 mean, I understand you have an overarching issue pending right
6 now, but the language does seem to be after Line 14 in draft
7 Instruction 28...

8 MR. KOSTO: I'm sorry, your Honor. What line?

9 THE COURT: Mr. Fernich did draft Instruction 28, and
03:27 10 it says after Footnote 14, which is the *Baugh* case, "To
11 determine whether a meaningful connection exists, you must
12 consider the nature of the crime alleged and the act or acts of
13 the essential conduct elements constituting it."

14 MR. FRANK: Yes, I think that's extremely confusing,
15 and the jury has no basis to determine what is essential
16 conduct. That's a term of art.

17 THE COURT: Right, so I understand what he's getting
18 at, though.

19 MR. FRANK: Yeah, I mean --

03:28 20 THE COURT: Why don't I just say "the act or acts"
21 instead of "the essential conduct"?

22 MR. FRANK: Because the fact is, for a continuing
23 offense, all we have to prove is that the wire passed through
24 this district, and so this other language sort of muddles that.

25 MR. FERNICH: Well, I don't agree that that's all they

1 have to prove, and I'll set that out in the brief for acquittal,
2 and these instructions are drawn from the cases that I've
3 cited.

4 THE COURT: Well, we'll look at those cases, but I
5 might say something like that. It's the act or acts, one of
6 the acts.

7 MR. FRANK: Something like what? I'm sorry, your
8 Honor.

9 THE COURT: I understand what you're saying, which is
03:29 10 the words "the essential conduct elements" is confusing.
11 That's appellate language, not jury language. But I don't
12 think it's so unclear to say, "You must consider the nature of
13 the crime alleged and the act or acts constituting it." That's
14 pretty clear. So that's what I'm likely to do.

15 MR. FRANK: I don't think we discussed our other
16 objection on this point, which was that the language before
17 Footnote 14 doesn't seem --

18 THE COURT: Well, I'm not sure it's applicable now
19 anyway, because of the statute anyway. I'm not sure I will
03:29 20 include it if that statute is on point. So it's just a
21 question mark for me. I mean, if the statute is not on point,
22 I think it's completely accurate.

23 MR. FRANK: Yeah, my point wasn't accuracy. It's just
24 a lot.

25 THE COURT: Because the question is --

1 MR. FRANK: This was to your Honor's --

2 THE COURT: -- the constitutional issue, if you will.
3 Even if your statute is correct, constitutional? In other
4 words, you seem to be reading it correctly -- I'm not refuting
5 that -- but how do you jibe that with the constitutional
6 requirement that a criminal defendant must be tried in the
7 state or states in which the offense shall have been committed?

8 MR. FRANK: The First Circuit has held and other
9 circuits have held that it applies. It's been upheld
03:30 10 repeatedly.

11 MR. KOSTO: We'll take a look.

12 THE COURT: I'm just thinking out loud. I don't know
13 how you reconcile that. On the other hand, you have a good
14 argument about the statute that I wish I'd thought about
15 before. I am not going to suddenly whip venue away from this
16 jury, so how I'm going to address this is a whole other issue.

17 MR. FRANK: I was just making a more mundane point,
18 which is that the language before Footnote 14, it's just
19 background; it's not really relevant to the decision they have
03:31 20 to make, and it sort of elevates --

21 THE COURT: What line are you referring to?

22 MR. FRANK: The introductory language describing the
23 background of the venue, the reason that venue is something
24 that's for the jury to consider.

25 THE COURT: Oh, you mean just the first sentence.

1 MR. FRANK: I'm sorry. I lost my page here. The
2 reference to Article III of the Constitution -- is that one
3 sentence? Yes, it is one. No, it's two sentences. No, it's
4 three sentences.

5 THE COURT: No, I'm going to tell them about
6 continuing offenses. I thought that the original venue
7 instructions were woefully inadequate. You have to explain
8 what we're talking about, and I'm struggling with --

9 MR. FRANK: Well, then at least the first sentence,
03:32 10 your Honor.

11 THE COURT: Well, I just have to think about it. The
12 first sentence is a hundred percent accurate, except I don't
13 know how I jibe it with that new statute you just --

14 MR. FRANK: It is accurate, but it's true of a lot of
15 the instructions. It's just we don't tell them for every
16 instruction that this is grounded in the Constitution.

17 MR. FERNICH: Well, I would say --

18 MR. FRANK: It would be unique --

19 THE COURT: Well, I actually do talk about --

03:32 20 MR. FRANK: You do generally in the beginning, but --

21 THE COURT: Anyway, all right, that's not a big point.
22 The big point is this new statute which I'm having cardiac
23 arrest over, but --

24 MR. FERNICH: No, there's no need for that. We'll
25 sort it out.

1 THE COURT: All right, so -- because I'm just not sure
2 what the right answer is. I'm unlikely to give a foreseeability.
3 I think it's a very fair issue preserved on appeal, if we
4 should ever get there. The Second Circuit plainly holds it,
5 and it's still good law in the Second Circuit. Many other
6 circuits have not held that, and it's not in the "continuing
7 offense" statute. That said, I will allow a question on it
8 tomorrow on whether it's foreseeable to him because I think
9 that's relevant information, but it's not going to be
03:33 10 dispositive by reasons of a jury instruction.

11 All right, so can we just talk together about what
12 this all means, since so much of this trial -- I don't want to
13 do a mistrial. I don't want to suddenly confuse the jury, why
14 did we do all this? I'm just trying to figure out whether I
15 just add a section on that as an alternative theory on venue.

16 MR. FERNICH: I want some time to take a look at it
17 because it talks about "If an offender/offenders is arrested or
18 is first brought." I'm willing to bet dollars to doughnuts
19 that the person who landed on the tarmac here wasn't already
03:33 20 under a sealed indictment and extradited here. An arrest is
21 different from an arrest upon an indictment. This was an
22 indictment that was sealed up. They sought his extradition.
23 It was preexisting. I get the fact that if somebody is in
24 transit and lands in a district and there's no pending
25 indictment and they pick him up and nab him, they can try him

1 anywhere, but this is a totally different kettle of fish.
2 There was a long-running investigation, and he was arrested on
3 an indictment that already laid venue in the District of
4 Massachusetts before he was arrested. Just I'd like a little
5 shot at taking a look at these cases. It can't be this. It's
6 not conceivable to me, and it can't be squared with the Sixth
7 Amendment.

8 MR. FRANK: So we don't object to counsel taking a
9 look at it, but as to your Honor's suggestion that as an
03:34 10 alternative, that would be fine, as long as we have the
11 opportunity to put in the question.

12 THE COURT: To?

13 MR. FRANK: To pose the question to Agent Hitchcock so
14 that that's in the record.

15 THE COURT: I'd be likely to do that with one
16 question, but the issue is, how do I address the statute? And
17 I just want to think about it. Tomorrow I think we may --
18 we're likely to finish tomorrow, potentially going into the
19 next day, but there's almost certainly going to be closings, so
03:35 20 I have to figure this out by Friday, and we will. Okay.

21 MR. KOSTO: Your Honor?

22 THE COURT: Yes.

23 MR. KOSTO: At the risk of one more issue, I think it
24 might be better now than at 8:30 tomorrow morning. The issue
25 with the last two website documents that Mr. Nemtsev would like

1 to introduce through Mr. McDonnell, who is the witness on the
2 stand, they relate to a website called the Wayback Machine
3 which is an archive on the Internet. The Wayback Machine is
4 not the subject of his disclosure. And the Wayback Machine, in
5 addition to being hearsay, is simply not something that the
6 government believes is appropriate subject for expert testimony
7 when it hasn't been disclosed. We anticipate that he would ask
8 him questions about the Wayback Machine --

9 THE COURT: If it's not in the report, he can't do it.

03:36 10 MR. KOSTO: It is not.

11 MR. NEMTSEV: Your Honor, he's not making an opinion
12 about the Wayback Machine. Mr. Wall from StackPath testified
13 that he believed that it was reliable, and this is just
14 something --

15 THE COURT: If it's not in the report --

16 MR. NEMTSEV: It's like a newspaper, though.

17 THE COURT: What?

18 MR. NEMTSEV: It's like an archive, an old newspaper.
19 You go to the library; you take out an old newspaper. This is
03:36 20 just for Internet websites.

21 THE COURT: Did he disclose in his report that he'd be
22 discussing it?

23 MR. NEMTSEV: I mean, we've disclosed these exhibits
24 for a long time.

25 MR. KOSTO: It's not in the report, your Honor.

1 THE COURT: I hold people to the reports, both sides,
2 I mean, if it's in there, but it's not in there.

3 MR. FERNICH: Can we just go back to venue --

4 THE COURT: Can I just say for a minute so I don't end
5 up with --

6 MR. NEMTSEV: Yeah.

7 THE COURT: What does it say? I don't even know.

8 MR. NEMTSEV: Oh, it just says -- it shows what
9 StrongVPN's website looked like back in the day. That's all it
03:36 10 shows.

11 THE COURT: What does it say?

12 MR. NEMTSEV: It just says they don't have a Boston
13 server. That's all it says. They never advertised it.

14 THE COURT: Excuse me?

15 MR. NEMTSEV: They never advertised it. They never
16 put it on the list of --

17 MR. KOSTO: Mr. Wall testified that it took a while to
18 update.

19 MR. NEMTSEV: He said weeks. I put in records for
03:37 20 nine months, Judge.

21 MR. FRANK: So he's putting it in for its truth now.

22 MR. NEMTSEV: Well, no. I'm putting it in as this is
23 what they advertise; this is the notice to the public.

24 Somebody would log into that VPN, try to access it; they
25 wouldn't even know that they have a Boston server, for God's

1 sake.

2 MR. FRANK: There's no evidence that the defendant
3 logged into it to look at it.

4 MR. NEMTSEV: Well, then I don't know why we're here.

5 THE COURT: That's a different issue altogether, but
6 if it's not in the report, it doesn't come in.

7 MR. FERNICH: Can I just go back to this venue for one
8 second because I think I've lost the forest for the trees here.
9 The Statute 3238 says, "The trial of offense is begun or
03:37 10 committed upon the high seas or elsewhere out of the jurisdiction
11 of any particular state or district." These offenses were not
12 committed out of the jurisdiction of any particular state or
13 district. If your Honor reads the Third Circuit case that I've
14 submitted, *Auernheimer*, there's no question that the offense
15 was committed, A, in Russia, and, B, at the locations of Toppan
16 Merrill in Minnesota and DFIN, wherever that was located. That
17 case makes clear that venue is proper in the place where the
18 hack was initiated or where the information was obtained. The
19 information was obtained in Minnesota, and it was obtained
03:38 20 wherever DFIN was.

21 THE COURT: What do you do with conspiracy, which
22 clearly started before then?

23 MR. FERNICH: The conspiracy could have also --

24 THE COURT: The agreement, I mean, they must have
25 because they're all Russian.

1 MR. FRANK: He's ignoring the first part of the
2 statute, your Honor.

3 MR. FERNICH: I'm not finished.

4 MR. FRANK: The statute begins the trial of all --

5 THE COURT: No, no. He's not finished.

6 MR. FERNICH: I'm not finished. "A conspiracy is also
7 committed wherever an overt act took place," which would also
8 have been committed in Minnesota where they took the
9 information, or wherever DFIN's headquarters is. This statute
03:39 10 is not applicable on its face, and that's *Auernheimer*.

11 MR. FRANK: He's ignoring the first part of the
12 statute, your Honor.

13 MR. FERNICH: No, because it's disjointed. I'm not
14 ignoring anything.

15 THE COURT: All right, thank you. I'll see you
16 tomorrow.

17 (Adjourned, 3:39 p.m.)
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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, Official Federal Court Reporter,
do hereby certify that the foregoing transcript, Pages 1
through 39 inclusive, was recorded by me stenographically at
the time and place aforesaid in Criminal No. 21-10104-PBS,
United States of America v. Vladislav Klyushin, and thereafter
by me reduced to typewriting and is a true and accurate record
of the proceedings.

Dated this 17th day of February, 2023.

/s/ Lee A. Marzilli

LEE A. MARZILLI, CRR
OFFICIAL COURT REPORTER